

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

DONNA M. FISHER AND SCOTT FISHER,  
H/W

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellants

v.

MALLARD CONTRACTING CO., INC., AND  
FARRAGUT ANTHRACITE COMPANY

Appellees

No. 2249 MDA 2012

Appeal from the Order Entered November 26, 2012  
In the Court of Common Pleas of Northumberland County  
Civil Division at No(s): CV-10-1024

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.\*

DISSENTING MEMORANDUM BY MUNDY, J.: **FILED NOVEMBER 25, 2013**

I respectfully dissent from the Majority's conclusion that no issue of material fact exists as to whether Appellees engaged in wanton misconduct. **See** Majority Memorandum at 13-14. The Majority relies on the trial court conclusion "that the Fishers offered 'no testimony that [Appellees] breached the aforesaid standard of willful or wanton misconduct on their part under the circumstances here. [The Fishers] encountered a mining pit that was generally made inaccessible to the public and an obvious danger to anyone.'" **Id.** at 13, *citing* Trial Court Opinion, 11/26/2012, at 3-4. After a thorough review of the certified record, I disagree.

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\* Retired Senior Judge assigned to the Superior Court.

Instantly, the Fishers aver that the evidence “could lead a reasonable jury to conclude that the conduct of the possessors of land meets the definition of wanton misconduct on the part of the possessors of land.” Fishers’ Brief at 11. Specifically, the Fishers assert that “[t]he expert witness report produced by [them] concludes that the possessors have [sic] land failed to correct the hazardous conditions created by the lack of guard rails or berms that resulted in serious injuries to Donna Fisher.” *Id.* at 12.

Our review of said claim is guided by the following.

Definitions of the terms willful and wanton...

... Correctly speaking, wilful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue. This, of course, would necessarily entail actual prior knowledge of the trespasser’s peril. **Wanton misconduct, on the other hand, “means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences[.]**

***Antonace v. Ferri Contracting Co., Inc.***, 467 A.2d 833, 835 (Pa. Super. 1983) (emphasis added).

The Fishers assert a jury could have determined that the conduct of Appellees constituted that of wanton misconduct. Specifically, the Fishers’ complaint asserted that Appellees “knew or should have known that

trespassers constantly entered upon the area known as 'The Mile' and traversed upon the property's trails and roads." The Fishers' Complaint, 8/27/10, at 3 ¶ 15. Further, Appellees "failed to post any warning signs, no trespassing signs, or gates to deter persons on the premises from utilizing the area where mining activities were occurring." **Id.** at ¶ 22.

On November 11, 2011, Frank Muscaro, the mine supervisor for Mallard Contracting was deposed and testified to the conditions around the mining pit in which the Fishers were injured. Muscaro testified he was familiar with "an area called the mile[,] and that a dirt road called "County Road" ran alongside the mining property which was a public road. Appellees' Motion for Summary Judgment, Exhibit A, N.T., 11/11/11, at 9, 11. Muscaro also testified that every 75 feet around the area being mined were warning signs posted on trees specifically stating "no ATVs" and that dirt berms blocked access to the area, although he admitted none of the pictures of the accident area show these signs. **Id.** at 13-14. In response to a question asking why no photos were taken of the sign apparently posted on the trail the Fishers entered, Muscaro replied "Don't know. Can't remember."<sup>1</sup> **Id.** at 34. Muscaro acknowledged seeing motorcycles and ATV tracks on the routes going in and out of the property, and that he had reported motorcycles being

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<sup>1</sup> Photographs of "no trespassing" signs were shown to Muscaro from the property, but he could not identify the location of where the photographed signs were posted. Appellees' Motion for Summary Judgment, Exhibit A, N.T., 11/11/11, at 41-44.

behind the property gates to his supervisor, Edward Helfrick. **Id.** at 55-56. While he could not say how many times he saw tracks he acknowledged it was more than 10 times but less than 50 times during the four years he worked on the cite. **Id.** at 55.

Further, Edward Helfrick was also deposed on November 11, 2011. During his deposition, Helfrick stated that he was the owner of Farragut Anthracite, which owned the property on which the accident took place. Helfrick testified that he was aware that there were people trespassing on the property owned by Farragut Anthracite, and that people were riding ATVs in said area. Appellees' Motion for Summary Judgment, Exhibit B, N.T., 11/11/11, at 16, 20. Helfrick testified that the day after the incident, he went to the accident site to take pictures "with the intention to take photographs in the event of a lawsuit." **Id.** at 23. He also testified that although there were photographs of the area around the accident, no photographs depicted "no trespassing" signs, and he conceded that while he couldn't remember if there was a sign posted, had there been a sign, he likely would have taken a picture of it. **Id.** at 29-30.

After thorough review of the deposition testimony, and pleadings in this matter, I believe there is an issue of material fact as to whether Appellees disregarded a risk they either knew about or was so obvious they should have been aware that harm would follow. **Antonace, supra.** As such, I conclude that the question of whether Appellees' conduct amounted

to wanton misconduct should be decided by a jury. **Rossino v. Kovacs**, 718 A.2d 755, 756-757 (Pa. 1998) (holding that “[i]n Pennsylvania, a trespasser may recover for injuries sustained on land only if the possessor of land was guilty of wanton or willful negligence or misconduct[.]”).

Because I conclude the trial court abused its discretion in granting summary judgment, I respectfully dissent. **See Petrina v. Allied Glove Corp.**, 46 A.3d 795, 797-798 (Pa. Super. 2012) (citations omitted) (holding “our standard of review of an order granting summary judgment requires us to determine whether the trial court abused its discretion or committed an error of law[.]”).